RECORD
AND
BRIEFS

No. 13-946

In the Supreme Court of the United States

RAUL LOPEZ, WARDEN, *Petitioner,*

v.

MARVIN VERNIS SMITH, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

As the petition explains (*e.g.*, Pet. 15-21), the court of appeals approached this matter by citing three of this Court's cases for the general proposition that a criminal defendant is entitled to fair notice of the charges against him (Pet. App. A at 14); citing only its *own* cases for the very different proposition that "a defendant who is charged with first-degree murder is entitled to notice of what specific theory of murder the prosecution intends to pursue" (*id.*); comparing the facts of this case to one of its own prior cases, in which it held that a prosecutor violated this "specific theory" notice right by requesting a jury instruction on a theory that the court concluded he had not sufficiently previewed during trial (*id.* at 16-20); and then pivoting back to conclude that respondent's "fundamental right to notice of the nature of the accusations against him was denied in violation of" *this Court's* cases (*id.* at 22; *see id.* at 20). For the reasons set out in the petition, that approach departs fundamentally from the framework for deferential federal habeas review of state court judgments established by Congress and this Court. *See also, e.g.*, *White* v. *Woodall*, 134 S. Ct. 1697, 1702 n.2 (2014) ("[A] lower court may not 'consul[t] its own precedents, rather than those of this Court, in assessing' a habeas claim governed by § 2254.").

Respondent's brief in opposition argues essentially that it does not matter whether the Ninth Circuit decided this case based on its own view of the *law*, because in the last step of its analysis the court reasoned that AEDPA does not bar relief where a state court judgment is based on an unreasonable determination of the *facts*. Under the circumstances here, however, that is no basis for avoiding review.

1. As discussed in the petition (at 16-18), the court of appeals improperly relied on its own precedents to conclude that respondent's state conviction was based on federal constitutional error. Pet. App. A at 14-15. This Court has repeatedly made clear that that is error. *See, e.g.*, *Woodall*, 134 S. Ct. at 1702 n.2; *Nevada* v. *Jackson*, 133 S. Ct. 1990, 1994 (2013) (*per curiam*); *Marshall* v. *Rodgers*, 133 S. Ct. 1446, 1450-51 (2013) (*per curiam*); *Parker* v. *Matthews*, 132 S. Ct. 2148, 2155 (2012) (*per curiam*).

Respondent argues (Opp. 28) that the Ninth Circuit properly relied on its own prior decisions as part of a *de novo* review conducted only after the federal court had concluded under Section 2254(d)(2) that the state court's judgment was based on factual findings with which no reasonable jurist could have agreed. But that is not what the Ninth Circuit did. Rather, after reciting the deferential standard of review established by Section 2254(d), the court cited three decisions of this Court that stand only for the general proposition that a criminal defendant has the right "to be informed of the nature and cause of the accusations against him so that he may have a meaningful opportunity to prepare an adequate defense." Pet. App. A at 14, citing *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *In re Oliver*, 333 U.S. 257, 273 (1948); and *Russell* v. *United States*, 369 U.S. 749, 766-68 (1962). The court then turned to its own precedents for the very different proposition that a defendant charged with first-degree murder is entitled to notice of the prosecution's specific theory of how the defendant committed the crime. *Id.* at 14-15, citing *Murtishaw* v. *Woodford*, 255 F.3d 926, 953-54 (9th Cir. 2001); *Morrison* v. *Estelle*, 981 F.2d 425, 428 (9th Cir. 1992); *Sheppard* v. *Rees*, 909 F.2d 1234, 1235 (9th Cir. 1989); and *Givens* v. *Housewright*, 786

F.2d 1378, 1380-81 (9th Cir. 1986). Applying only those precedents, the court held even more specifically that this right to notice of a particular theory of prosecution could be violated where the prosecution, in the court's view, led the defense to understand that it was proceeding on one theory but then, at the close of the evidence, requested a jury instruction on an additional theory. *Id.* at 16-17. And it then held that respondent's rights had been violated because, in that regard, this case was "indistinguishable from [the Ninth Circuit's prior decision in] *Sheppard*."

The court of appeals never purported to conclude that respondent's case was indistinguishable from any decision of *this Court*. Its reasoning was that its own decision in *Sheppard* "faithfully applied the principles enunciated" by this Court's general notice cases (Pet. App. A at 17); that this case was like *Sheppard* (*id.* at 17-20); and that, therefore, "Smith's constitutional right to notice under [*this* Court's decisions in] *Cole*, *Oliver*, and *Russell*, was violated" (*id.* at 20). And that reasoning *preceded*, in the court's opinion, any consideration of whether the state court's decision rested on some purportedly wholly unreasonable finding of fact. *See id.* at 23.

That approach to federal habeas review cannot be reconciled with the limitations imposed by AEDPA and repeatedly recognized and enforced by this Court. Although respondent suggests that this Court's cases may clearly establish the law even if it is necessary to apply them in a new factual context (*see* Opp. 31-32), the Court has repeatedly made clear that where the Court has not squarely addressed an issue, there is no controlling precedent for purposes of AEDPA.

A "specific" legal rule may not be inferred from this Court's decisions; rather, the Court must have "squarely" established the rule. *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011); *Knowles* v. *Mirzayance*, 556 U.S. 111 (2009). By its very terms, "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *Woodall*, 134 S. Ct. at 1706 (original emphasis). Indeed, "AEDPA's carefully constructed framework 'would be undermined if,'" as respondent suggests, "'habeas courts introduced rules not clearly established under the guise of extensions to existing law.'" *Id.* (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004)). Instead, under Section 2254(d)(1)'s stringent review standard, a federal habeas court may set aside a state conviction based on an alleged constitutional error only where "it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement'" as to the issue. *Id.* (quoting *Richter*, 131 S. Ct. at 786-87).

Respondent cites *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), as an example of this Court extending clearly-established precedent to a new context—the general prejudice test for ineffective assistance of counsel at trial to the effectiveness of counsel during the plea-bargaining process. Opp. at 32-34. But this Court explained in *Lafler* that its ruling was based on its prior precedents, including *Hill* v. *Lockhart*, 474 U.S. 52 (1985), that had already established that the constitutional right to effective assistance of counsel extends to the pretrial plea process. Here, there is no prior holding of this Court establishing either that a defendant is constitutionally entitled to notice of the prosecution's specific theory of guilt, or

that constitutionally adequate notice provided by a charging document may later be vitiated by inferences drawn by the defense (or a later reviewing court) from the prosecutor's conduct before or during trial. Those are propositions critical to the court of appeals' decision here, but the court drew them only from its own precedents. There was accordingly no basis for the federal court here to conclude that the state court judgment in respondent's case was contrary to "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

2. That legal error cannot be sidestepped by characterizing the court of appeals' application of AEDPA as turning instead on two "factual findings": that preliminary hearing testimony concerning a possible informant witness "meaningfully apprised" respondent of the possibility of an aiding-and-abetting theory, and that the prosecutor's request for an aiding-and-abetting instruction after the close of the evidence came far enough in advance of closing arguments so that defense counsel had adequate time to prepare a response (or seek a continuance for that purpose). *See* Pet. App. A at 23-24.

First, as the petition explains (at 22), those "findings" are relevant only if one first accepts the court of appeals' erroneous approach to ascertaining the applicable law. Relying on them to justify the federal court's conducting a *de novo* legal analysis, rather than deferential review under AEDPA, is entirely circular.

Second, and in any event, the putative "findings" are not findings of historical fact of the sort addressed by AEDPA, 28 U.S.C. § 2254(d)(2). This Court has long explained that "issues of fact" are "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of

their narrators ....'" *Thompson* v. *Keohane*, 516 U.S. 99, 109-110 (1995) (quoting *Townsend* v. *Sain*, 372 U.S. 293 (1963), quoting *Brown* v. *Allen*, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)). In contrast, "mixed questions" of fact and law require the application of a legal standard to the facts, and therefore are not issues of basic, primary, or historical fact. *Id.* at 110 (citing *Townsend*, 372 U.S. at 309, n.6). In some instances, this Court has extended the meaning of "factual issues" beyond the basic determination of "what happened." *Id.* at 111 (citing *Maggio* v. *Fulford*, 462 U.S. 111, 117 (1983) (competency to stand trial); *Wainwright* v. *Witt*, 469 U.S. 412, 429 (1985) (trial court's determination of juror bias in excluding juror for cause); *Patton* v. *Yount*, 467 U.S. 1025, 1036 (1984) (same); *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983) (same). But those cases involve issues whose "resolution depends heavily on the trial court's appraisal of witness credibility and demeanor," an appraisal the trial court is best positioned to make. *Thompson*, 516 U.S. at 111. Where a determination involves the application of a legal standard to historical facts, the Court has instead treated the issue as one of law. *Thompson*, 516 U.S. at 116 (whether defendant in custody at the time of confession); *Id.* at 111-112 (citing *Miller* v. *Fenton*, 474 U.S. 104, 116 (1985) (whether confession voluntary); *Strickland* v. *Washington*, 466 U.S. 668, 698 (1984) (whether counsel provided effective assistance); *Cuyler* v. *Sullivan*, 446 U.S. 335, 341-342 (1980) (whether attorney's representation of multiple defendants gives rise to conflict of interest)).

The state-court conclusions cited by the federal court of appeals here are not matters of historical fact. In reaching those conclusions, the state court assessed, for example, whether a particular event

gave the defendant "meaningful" notice, and whether his time to respond to a purportedly surprising request for a jury instruction on an alternative theory of guilt was adequate under the circumstances of the case. At a minimum these conclusions involve mixed questions of fact and law, focusing on the legal implications of a situation whose factual details are not disputed. They were not findings of fact that a federal court could properly deem "unreasonable" for purposes of Section 2254(d)(2).

And finally, even if the two propositions identified by respondent and the court of appeals were findings of historical fact, the panel had no proper basis for rejecting them under Sections 2254(d)(2) and (e)(1). Indeed, the court of appeals never truly even analyzed the "factual findings" for objective unreasonableness. It simply substituted its own judgment that, despite the preliminary hearing testimony—suggesting that respondent had a motive to kill his wife and took steps to stage the house as a burglary scene—it would not have concluded that he took these steps so that an accomplice could complete the murder. Pet. App. A at 21. Likewise, rather than showing how the state court's interpretation of the record—that the defense had adequate opportunity to prepare a response as the prosecutor asked for the aiding-and-abetting instruction at the jury instruction conference and not just prior to closing argument as there was a lunch break in between—constituted an error so obvious and indisputable that reasonable minds could not even disagree, the court of appeals merely asserted that the timing of the prosecutor's request did not afford the defense adequate time to respond. Pet. App. A at 24. But "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in

the first instance." *Wood* v. *Allen*, 558 U.S. 290, 301 (2010). Even if reasonable minds could disagree about the finding, that does not suffice to overturn the state court's determination. *Rice* v. *Collins*, 546 U.S. 333, 341-342 (2006). Here, the state court's conclusions were presumptively correct; they were not objectively unreasonable; and respondent never showed them to be false by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Nothing about them was, or was clearly shown to be, so plainly unreasonable as to warrant setting aside a state court judgment.

3. Finally, the court of appeals' departure from the proper bounds of AEDPA review warrants correction by this Court in this case. In characterizing the decision below as "unique" and "heavily fact-bound" (Opp. 5), respondent never comes to grips with the potential impact of the Ninth Circuit's published decision in light of the law and standard charging practices in California (and likely other States), which have never required the prosecution to specify any particular theory of culpability at the outset of a criminal case. If permitted to stand, the court of appeals' opinion will subject criminal convictions in California and other States to attack, both on direct appeal and in federal habeas proceedings, on the premise that, in the view of the Ninth Circuit, it has long been "clearly established" as a matter of federal constitutional law that a murder defendant is entitled to notice of the government's specific theory of prosecution -- and that in some circumstances it may properly be inferred, based on how a particular case develops, that the government has become constitutionally barred from pursuing theories of liability that it has not articulated and preserved to the satisfaction of the defendant and a reviewing court. While each set

of specific facts in which that argument is invoked may well be "unique," the whole premise for the argument in each such case will be the same important error of law.

It is certainly true that, as respondent notes, "this Court has *already* provided guidance, through multiple decisions, on how federal habeas courts should 'apply the deferential standard of review required by 28 U.S.C. § 2254(d).'" Opp. 5 (original emphasis). As the petition notes (at 24-25), however, the Court has nonetheless repeatedly found it necessary to intervene when courts of appeals have plainly failed to abide by the restrictions that Congress has imposed on federal courts setting aside state convictions. The Court's intervention is again warranted in this case, in which the Ninth Circuit relied on its own precedents to vacate a state murder conviction on the basis of a putative constitutional rule that this Court has never adopted and that could have very broad effects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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